AND /
BRIEFS

Nos. 15-1503 & 15-1504

In the Supreme Court of the United States

CHARLES S. TURNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR PETITIONERS CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, AND TIMOTHY CATLETT

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QUESTION PRESENTED

Whether petitioners' convictions must be set aside under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

PARTIES TO THE PROCEEDING

Petitioners in Case No. 15-1503 are Charles S. Turner, Clifton E. Yarborough, Christopher D. Turner, Kelvin D. Smith, Levy Rouse, and Timothy Catlett. They were joined in the proceedings below by Russell L. Overton, one of their co-defendants at trial and the petitioner in Case No. 15-1504. The Court granted both petitions and consolidated the cases.

The United States of America is the respondent.

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-78a) is reported at 116 A.3d 894. The order of the District of Columbia Court of Appeals denying rehearing (Pet. App. 79a-80a) is unreported. The opinion of the Superior Court of the District of Columbia denying petitioners' motions to vacate their convictions or for a new trial (Pet. App. 81a-131a) is unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on June 11, 2015. A petition for rehearing was denied on January 14, 2016. The petition for a writ of certiorari was filed on June 10, 2016, and granted on December 14, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1257(a) and (b).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law[.]

STATEMENT

This case involves the suppression of exculpatory and impeachment evidence in one of the District of Columbia's most infamous crimes—the 1984 murder and assault of Catherine Fuller, a 48-year-old mother. Lacking any physical evidence, the government went to trial against ten defendants based on purported eyewitness testimony that the defendants participated in a group attack on Mrs. Fuller. The jury deliberated for a week before returning any verdicts, and ultimately acquitted two defendants and convicted eight others. The seven surviving men convicted of this crime—petitioners here—continue to assert their innocence.

Post-conviction proceedings have uncovered compelling evidence supporting both petitioners' claim of innocence and their claim that the prosecution suppressed material, favorable information in violation of their due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases. That evidence includes multiple witness statements that placed at the crime scene a violent felon with a history of assaulting middle-aged women in

the same neighborhood; multiple witness statements that groans were heard coming from the garage where Mrs. Fuller's body was found at the estimated time of death but no group was present; information that police received and then lost a potential eyewitness statement that someone other than petitioners committed the crime; and information impeaching prosecution witnesses.

After an evidentiary hearing, the trial court denied petitioners' motions for post-conviction relief, and the District of Columbia Court of Appeals affirmed.

A. The Murder Of Catherine Fuller

Shortly after 4:30 p.m. on October 1, 1984, Catherine Fuller left her home to go shopping. Pet. App. 4a. She lived approximately four blocks from the intersection of Eighth and H Streets, Northeast. J.A. 29. Although the weather was overcast, the neighborhood was bustling with activity. J.A. 146-147.

Around 5:30 p.m., a group of at least four people walked through the alley that runs parallel to H Street between Eighth and Ninth Streets. J.A. 25. A garage stands at the center of the alley, where the alley meets another. See J.A. 29 (map of area). As the group walked through the alley, some members of the group heard groans coming from the garage, and one member noticed that both doors to the garage were closed. J.A. 25, 27.

A half hour later, at 6:00 p.m., William Freeman, a street vendor working on the corner of Eighth and H, walked to the garage to relieve himself. He noticed blood pooling under one of the garage doors and saw that the other door was open. Pet. App. 4a. Looking inside, he discovered Mrs. Fuller's body in the northwest corner of the garage, one or two feet away from both the closed door and one of the walls of the garage and near an upright shoeshine box. J.A. 30 (sketch of crime scene). Debris

littered the garage floor and a large garbage cart occupied the southeast portion of the garage. The victim was naked except for her bra and sweater, which had been pushed up her torso. A2207.[1] It was later determined that Mrs. Fuller had been badly beaten and sodomized with an object. Pet. App. 4a. The object was never recovered.

Freeman returned to the street to alert the authorities and to inform others of what he had seen. A few minutes later, he returned to the garage, where he was joined by others, including Jackie Tylie and Charnita Speed. As Freeman was waiting for the police, he saw two young men run into the alley from Ninth Street whom he recognized from having seen them pace H Street throughout the day. The two men stopped by the garage and stood there for several minutes, and one of the men had "something in his coat because it was puffed up." When the police arrived, Mr. Freeman heard one say, "[D]on't run," but the two men ran anyway as the police approached. A1357.

B. The Investigation

1. At 2:45 a.m. that night, police received a tip from an anonymous caller who claimed that there was a group of young men who "hung in the alley" called "The 8th and H Crew." He further asserted that three of them, "Monk Harris, Levi, and Ernie Yarlboro [sic] * * * talk[ed]

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[1] "A" citations refer to pages in the hardcopy appendix in the D.C. Court of Appeals, which the parties have moved to be deemed additional volumes of the joint appendix in this case. An updated table of contents to that hardcopy appendix is at the end of the booklet volume of the joint appendix. See J.A. 329-340. Petitioners also submitted to the D.C. Court of Appeals an electronic appendix containing the entire trial and hearing transcripts, which were also paginated with "A" numbers. To assist the Court, references to transcript excerpts that do not appear in the joint appendix, including the hardcopy appendix, will include parenthetical references to those "A" citations.

about pulling females into the alley to rape" and had "moved a car out of the garage * * * 3 or 4 hours before the body was found." A1370. That day, police found an abandoned car with "Monk of [the] 8th and H crew" written in the dust. A1365.

On October 3, police spoke with petitioner Rouse and Vincent "Boo" Gardner. A1375, A1385. Both Rouse and Gardner were friends with Mrs. Fuller's son David, and remained so after his mother was killed. A1385. Rouse and Gardner repeated to police the rumors swirling in the neighborhood, among them a story that Ernie Yarborough, Alphonso "Monk" Harris, and Rouse had killed Mrs. Fuller, possibly by stabbing, for $3,000 in jewelry. All three denied any involvement. A1375, A1385.

The next day, the police picked up and interviewed brothers Ernie Yarborough and petitioner Clifton Yarborough. A1388. Clifton Yarborough was 16, had an IQ below 70, and could read at only a third- or fourth-grade level. A1846-A1849, A2073. According to the government, the detectives separated him from his older brother and told Yarborough that they knew he was at the scene of the murder, that he was lying if he denied it, and that if he continued to deny knowing about the murder, he could end up being charged with the crime. A2040. Yarborough gave the police a statement, telling them that Harris had told him that Harris, Rouse, "Burt," "Darrin," "Warren," and "Fellow" robbed Mrs. Fuller. A1178. Police arrested Harris that day, including in the warrant application that seven additional individuals were believed to have participated in the attack. A1568-A1570.

2. The police had no physical evidence to identify the perpetrator or perpetrators. On October 18, the detectives brought Harris in for a lineup in the hope that Freeman would identify him as one of the two men who had acted suspiciously in front of the garage. A227-A228,

A1291. Freeman did not do so. For the next month, the investigation stalled as the detectives grew frustrated that community members did not come forward to support the group-attack theory. See A2484-A2485.

When interviewing young people they thought may have knowledge of the crime, the detectives adopted aggressive techniques—including yelling, slamming their hands on desks, and threatening witnesses that they would go to jail if they "did not come clean and finger others." Pet. App. 15a n.11. At petitioners' post-conviction proceeding, witnesses who were never arrested or called at trial confirmed the detectives' methods. A2282-A2283, A2594-A2595.

The "break" in the investigation occurred in late November, when a detective interviewed Carrie Eleby about an unrelated nightclub fight. Ms. Eleby was sixteen and a PCP user; as a clinical psychologist had previously determined, she had an IQ of 63, and was "interested in thrill seeking behavior and immediate impulse gratification." A1343-A1344. While being questioned, Eleby spontaneously volunteered that she knew who had killed Mrs. Fuller. At the detective's request she came to the police station the next day to give a statement. Eleby claimed that a man named Calvin Alston had confessed to her and Kaye Porter that he and several other people had been involved in the murder. Pet. App. 22a. She also brought along Porter to corroborate her story, which Porter did. Porter would later confess to a prosecutor that she had made the story up at Ms. Eleby's behest and that she had never heard Alston confess. *Ibid.*

Based on Eleby's statement, the police arrested Alston. After Alston denied any involvement in the crime, one of the detectives told him he faced life in prison if he did not talk to them, comparing the crime to a pie in which Alston could have either a slice or the whole thing. 11/7/85

Tr. at 139-141 (A6524-A6526). After further questioning by detectives, Alston eventually described witnessing a group assault in a videotaped statement. As he told the detectives, he thought giving the statement would allow him to be "a free man." A1175. Much of Alston's statement was objectively false. For example, he drew a diagram placing the sexual assault on the south side of the garage, approximately where a large trash cart was located. Compare J.A. 59 (Alston sketch) with J.A. 30 (crime-scene sketch). As the government conceded in the post-conviction proceeding, the sexual assault took place at the other end of the garage, where Mrs. Fuller was found. A2603.

Police arrested four individuals whom Alston named in his statement—petitioners Yarborough, Timothy Catlett, Russell Overton, and Christopher Turner. The same detectives who interrogated Alston also interrogated Yarborough. In addition to the techniques used on Alston and other witnesses, the detectives acknowledged engaging in a theatrical good cop/bad cop routine designed to be "intimidating to the witness." A2564. According to the detectives' own account, one of them yelled at Yarborough repeatedly and pretended to be so enraged that he had to leave the room, only to pound on the door and yell "Let me back in!" A2469-A2470. That same detective later stormed into the room and "either pretended to or actually did tear off his t-shirt for dramatic effect." Pet. App. 68a. He later testified that these techniques were intended to convince Yarborough that "he would be better off if he told [the detectives] what he thought [they] wanted to hear." A2538.

Yarborough eventually gave a videotaped statement in which he claimed that he had witnessed a large group attack Mrs. Fuller. "Many of the things Yarborough said on the videotape seem unlikely when compared with other

evidence." Pet. App. 70a. One notable example involved Yarborough gesturing that Mrs. Fuller's "blouse" was ripped off her. A1035. Mrs. Fuller's sweater had not been ripped off of her; the perpetrator pushed it up her chest. A2207. And, like Alston, Yarborough described Mrs. Fuller being sexually assaulted in the wrong location: according to Yarborough, outside the garage entirely. A1033.

Two months later, on February 6, 1985, the same detectives interrogated Harry Bennett, again threatening that he alone would be found responsible for Mrs. Fuller's death if he failed to "come clean and finger others." Pet. App. 15a n.11. Like Alston and Yarborough, after hours of interrogation, Bennett gave a videotaped statement that got basic facts about the crime scene wrong: he also had the sexual assault occurring in the wrong location, such that he could see it through an open garage door. A1090.[2]

C. The Trial

1. The government originally charged seventeen people for participating in the assault on Mrs. Fuller. Pet. App. 83a n.3. A grand jury later indicted thirteen of the seventeen. Bennett and Alston pleaded guilty to reduced

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[2] In May 1985, James Campbell gave a videotaped statement to police that was not used at trial. Both the lead prosecutor and detective disbelieved parts of Campbell's statement, with the prosecutor describing him as the most "exaggerated" witness, A2414, and the detective more colloquially describing Campbell as "full of s--t." A2588-2589. According to Campbell, Carl McPhail (not implicated by anyone else) attacked Mrs. Fuller with a golf club (not mentioned by anyone else), and Harris brandished a gun (also not mentioned by anyone else). 5/7/12 Hr'g Tr. at 1877-1879 (A13249-A13251). Campbell, also alone among the individuals to give statements, identified James McMillan as being in the alley. 5/7/12 Hr'g Tr. at 1889-1890 (A13261-A13262); but see A1113 (Bennett stating McMillan was not there).

charges in return for their testimony against the other defendants. Campbell's trial was severed after his attorney became ill; he later pleaded guilty to lesser charges after petitioners' convictions. The cases against the remaining ten defendants—the seven petitioners, Harris, Felicia Ruffin, and Steven Webb—proceeded to trial. Pet. App. 5a.

The prosecution's theory was that the ten defendants, along with others, had been hanging out in the park on the south side of H Street. Some of the group decided to commit a robbery, and one of them pointed to Mrs. Fuller as she walked down a nearby street. They crossed the street after her and forced her into the alley, where they beat and kicked her. Mrs. Fuller was then dragged into the garage, where she was held down while Rouse sodomized her with a pole. While most of the perpetrators then left, the prosecutor argued, someone stayed behind to move Mrs. Fuller's body to the corner of the garage, where it was found. J.A. 149-156.

2. The lead prosecutor has admitted that the trial "easily could have gone the other way." A1751. The prosecution did not have any physical evidence tying petitioners to the crime. And, despite the heavy foot traffic that day and the many houses and businesses that backed up on the alley, J.A. 29, 146-147, the prosecution did not have any corroborating testimony from adults that they saw or heard a group pursue and assault Mrs. Fuller.

a. One of the prosecution's first witnesses was Freeman, the street vendor. He testified to working at a stand on the corner of Eighth and H throughout the day on October 1, and to discovering Mrs. Fuller's body. A202-215. He also testified about "two dudes" who ran into the alley from Ninth Street and stayed until the police arrived. A215-A220. Through pretrial disclosures, Harris's counsel knew that Freeman had not identified Harris in a

lineup. J.A. 62. During a hearing outside the presence of the jury, the prosecution refused defense counsel's request that it disclose the names of the two individuals whom Freeman had identified. J.A. 62-64. On cross-examination, Freeman testified that none of the defendants was one of the two men he saw in the alley. A244.

Freeman went on to testify on cross-examination that he had been monitoring the corner of Eighth and H as part of his work. A233. He testified that he did not see any group of young men hanging out or running up Eighth or Ninth Street. Nor did he hear any shouts coming from the alley. A246-247. Rather, he had noticed, and been suspicious of, the two men who had been walking up and down H Street all day and who later had waited by the garage. A237.

The prosecution's final witness in its case in chief was the medical examiner, Dr. Michael Bray. He estimated that Mrs. Fuller died at 5:30 p.m. A707. Consistent with the autopsy report, Dr. Bray testified that Mrs. Fuller died from blunt force trauma, and sustained injuries to her head, right torso, and anus, as well as abrasions to her face. A1190-A1201. She also had wounds to her back consistent with having been dragged across pieces of glass. A1199. He could not determine how many people were involved in the attack on Mrs. Fuller. Pet. App. 4a.

b. The prosecution's inculpatory evidence came almost exclusively from a small number of witnesses with pronounced credibility problems. As the lead prosecutor himself told the jury in closing, his witnesses were "young," "inarticulate," and "quite frankly * * * not very smart sometimes." J.A. 193. Many were drug dealers or had drug problems. And each had told, and would continue to tell at trial, shifting and inconsistent stories. The prosecution's star witnesses were Alston and Ben-

nett, who had each received reduced sentences in exchange for their testimony. Alston had spent the eight months after his videotaped statement writing letters to judges and government officials asserting that he had lied under pressure; he had agreed to plead guilty only after being raped in prison and losing a motion to suppress his statement. A1559, A2099-A2108. In exchange for Bennett's testimony, the government agreed both to reduce a charge for cocaine distribution to simple possession and to allow him to be released pending sentencing. A2123-A2124.

i. Although the prosecution relied heavily on Alston and Bennett, the lead prosecutor's view after trial was that the jury harbored sufficient doubts about them that it had not been willing to convict someone based on only their testimony. A1741. Alston's and Bennett's trial testimony was riddled with inconsistencies—with each other and with their own prior statements—about details central to the crime to which they had confessed. Bennett, for example, had said in his videotaped statement that two people had sodomized Mrs. Fuller. A1117. By trial, consistent with the other purported eyewitnesses, he identified only one person. A411. And, while both men testified that Mrs. Fuller's legs were held down while she was assaulted, they identified different defendants doing so. Bennett identified Alston and Webb. A410-A411. Alston identified Charles Turner and Overton. A497-A498. In Alston's case, this contradicted his videotaped statement. A1156.

Both men further modified their testimony in a way that conveniently fit the prosecution's charges. Alston's videotaped statement included Daryl Murchison's suggesting that everyone rob Mrs. Fuller. A1151. Murchison was not indicted and, by trial, Alston said *he* had sug-

gested Mrs. Fuller. 11/7/85 Tr. at 19 (A6404). In Bennett's videotaped statement, he specifically excluded Catlett, Christopher Turner, Charles Turner, and Harris. A417, A1120, A1125-A1126. At trial, however, he named them all as accomplices. A392, A411, A415.

ii. The prosecution sought to bolster Alston and Bennett's testimony with testimony from three other purported eyewitnesses: Eleby, Linda Jacobs, and Maurice Thomas.

Eleby and Jacobs were friends and had "significant credibility problems." Pet. App. 6a. As noted above, Eleby was sixteen and mildly retarded. A1005, A1343. Jacobs, a fourteen-year-old runaway, testified "with her hands in her mouth the whole time." A1009, A2269. Both were PCP users who admitted to using the drug before purportedly observing events in the alley. A535-A536, A649.

Despite supposedly witnessing the crime together, Eleby and Jacobs gave markedly different accounts. Each had differing explanations of how they came to be in the alley. Pet. App. 7a. Eleby described Mrs. Fuller lying on her stomach during the sexual assault; Jacobs said she was on her back. A1999, A1967. They even disagreed about where they watched the assault, with Eleby placing them at a fence twenty feet from the garage and Jacobs placing them inside the garage. A550-A551, A657.

What is more, each witness contradicted herself on the stand. Pet. App. 6a. Eleby claimed not to remember anything she had told investigators or the grand jury. And her testimony that she had only used PCP on the day of the crime was "unbelievable on its face." *Id.* at 46a. As to Jacobs, the court of appeals acknowledged that the jury may have "disbelieved most of [her] testimony." *Ibid.*

The prosecution's last purported eyewitness, Thomas, was only in eighth grade when he testified at trial. J.A.

112. Thomas did not claim to have been in the alley. Instead, he testified that, while walking back to his house after having dinner with his aunt at her house, he looked across Ninth Street and down the alley and saw a group attacking a woman. J.A. 114-116. Perplexingly, he claimed that the same aunt was waiting at his house when he arrived there. J.A. 120. He testified that he told her what he had seen, and she told him not to tell anyone. J.A. 121.

Like the other witnesses, Thomas changed his story over time. In his first grand jury appearance, Thomas testified to witnessing a group attack in front of the garage from a separate alley on the other side of Ninth Street. A1943-A1944. That alley, however, does not enter Ninth Street at the same point as the alley where Mrs. Fuller was attacked, making it impossible for Thomas to see the area around the garage. See J.A. 50. In his second grand jury appearance, Thomas elaborated on his account, describing a second group of people observing the assault from the Ninth Street side of the alley. A1953-A1955. But, if such a group had existed, it would have blocked his view of the crime. By trial, Thomas had altered his testimony to address both problems: Thomas testified that he had stood on the Ninth Street sidewalk, from where he could look down the alley. J.A. 128-130; A628. And Thomas flipped the two groups he claimed to see, testifying that the assault took place on the Ninth Street side of the alley, with the observing group having been further down the alley, by the garage. A629-A641. As the court of appeals noted, the jury disbelieved at least part of Thomas's testimony, as it convicted one of the defendants despite Thomas's saying he had not been in the alley. Pet. App. 47a.

iii. The government also relied on two other witnesses who indirectly corroborated the government's version of

events but did not claim to see the attack. Melvin Montgomery, a teenage drug dealer, claimed to have been in the park with some of the defendants and to have seen some of them cross H Street to rob someone. Pet. App. 7a. But Montgomery was impeached on numerous grounds; he admitted that he had denied any knowledge of the crime and only provided information to detectives when they threatened to put him in jail. A322.

Porter, who had previously admitted to the prosecution that she had lied about *Alston's* supposed confession at Eleby's behest, testified at trial that petitioner *Catlett* had supposedly confessed his involvement months after the assault. Pet. App. 8a. But she was impeached with her grand jury testimony, in which she had testified that Catlett had *not* admitted his involvement to her. *Id.* at 46a.

3. The ten defendants presented their cases through separate counsel who did not know either the identity of the two men Freeman had seen acting suspiciously at the garage or that a witness had heard groans coming from a closed garage around 5:30 p.m. The dynamic of having so many defendants and no common defense worked to the prosecution's advantage. As a leading criminal-defense lawyer told the Washington Post in an article about this trial, "[a] guy trying to extract his client has to point the finger at somebody else." Saundra Saperstein & Elsa Walsh, *Ten Defendants Complicate Trial; Murder Case Attorneys Often Find Themselves at Cross-Purposes*, Wash. Post, Nov. 17, 1985, at A1. Without an alternative perpetrator to implicate, defense counsel resorted to the defense that, while other co-defendants may have attacked Mrs. Fuller, his client was not among that group. The proceedings devolved to such an extent that, after one defense lawyer finished a supposed cross-examination of a prosecution witness, another defense lawyer was heard

muttering as he left the courtroom, "They've got three prosecutors in the courtroom now." *Ibid.*

Five petitioners, as well as Harris, presented alibi defenses. Smith and Christopher Turner testified that they spent the afternoon together at Smith's grandmother's house, and called several supporting witnesses. Pet. App. 9a. Charles Turner testified, also with several supporting witnesses, that he left the park in the early afternoon and spent the rest of the day at home and at his sister's house. *Id.* at 10a. Overton presented multiple family members who testified that he was napping at home that afternoon. 11/21/85 Tr. at 27-82 (A8608-A8764). Rouse testified to spending the afternoon at various arcades and restaurants around the neighborhood. Pet. App. 10a.

On cross-examination, the prosecution identified inconsistencies in some of the testimony from alibi witnesses. For example, Charles Turner said he was at home, which was inconsistent with Rouse's recollection that he had spent the afternoon with him. Cross-examination of one of Rouse's alibi witnesses, Christopher Taylor, revealed that he had spoken to detectives while high on PCP, although he was so affected that he did not even remember talking to them. 11/21/85 Tr. at 16-22 (A8913-A8919), see A999 (Taylor stating the same to investigators and denying being at the crime scene). The detectives later testified that Taylor had indicated that he had witnessed the assault. Pet. App. 10a.

4. After a short rebuttal case by the government, the parties moved to closing arguments. As the lead prosecutor would later tell a reporter, he thought that "everything sort of fell" the prosecution's way. A1751. Because the defendants had not presented an overarching, unified defense, the prosecution was able to dismiss as "smokescreen[s]" in its closing both the lack of physical evidence inculpating petitioners and Freeman's failure to

identify Harris as one of the two men in the alley. J.A. 184-185, 211-212.

As affirmative evidence of guilt, the prosecution focused on the testimony of its witnesses. The lead prosecutor conceded their weakness, stating as follows: "It would have been better if there had been no deals made, no bargains. * * * It would have been better if there were no drugs involved. It would have been better if nobody had ever lied about anything." J.A. 238-239. But, he noted, the defendants were asking the jury to believe some of the same witnesses. He mockingly paraphrased "the ten arguments" as follows: " 'The believable witnesses are the witnesses who didn't say my client was there. The unbelievable witnesses are the witnesses who say my client was there.' " J.A. 185.

In his final minutes before the jury, the lead prosecutor assured that, "[a]fter an exhaustive and intense police investigation, the only witnesses who came forward or were brought forward [or] were found, you have heard from." J.A. 239. As to those witnesses, he stated, the jury should put aside the inconsistencies in their testimony and rely on their demeanor. "Think about when Harry Bennett cried," he asked the jury. J.A. 242. "Think about those tears. Think about that face. Think about those emotions." *Ibid.* He invited the jury to do the same with Alston: "Think about Calvin Alston and * * * how he got all torn up when he started thinking about that moment." *Ibid.*

5. The jury deliberated for seven days. It eventually returned a mixed verdict, acquitting Harris and Ruffin, but convicting five of the petitioners and Webb, who were each convicted of two counts of first-degree felony murder and one count each of kidnapping and armed robbery under D.C. Code §§ 22-2101, 22-2401, 22-2901, and 22-3202

(1981 & 1987 Supp.). The jury reported that it was deadlocked as to Christopher Turner and Overton. After two more days of deliberations, and numerous votes, the jury convicted them of the same charges. Pet. App. 10a-11a.

The acquittals of Harris and Ruffin were notable in light of the prosecution's reliance on Alston's and Bennett's testimony. Both Alston and Bennett had inculpated Harris; Alston even testified that Harris made a grotesque comment during the sexual assault. J.A. 155, 161. And Bennett testified that Ruffin was given one of Mrs. Fuller's rings in the garage and had gathered her jewelry from the floor in the alley as Mrs. Fuller was being beaten. A400, A406. The jury nevertheless voted to acquit both Harris and Ruffin.

6. Although the District of Columbia Court of Appeals vacated two charges for each petitioner in light of merger issues arising out of the felony-murder charges, the court otherwise affirmed petitioners' convictions in two decisions. *Catlett* v. *United States*, 545 A.2d 1202 (D.C. 1988); *Turner* v. *United States*, Nos. 86-314 & 90-530, Mem. Op. & J. (D.C. Jan. 24, 1992).

D. The Disclosure Of *Brady* Information And Petitioners' Post-Conviction Proceedings

Petitioners have consistently maintained their innocence for more than three decades. Many years after their trial, a Washington Post reporter brought to light flaws in the prosecution case. See, *e.g.*, Patrice Gaines, *A Case of Conviction*, Wash. Post, May 6, 2001, at F1. Eventually, all but one of the living purported eyewitnesses gave statements recanting their testimony. Based on that information, in 2010, petitioners filed motions to vacate their convictions or alternatively to receive new trials in the Superior Court of the District of Columbia under D.C. Code § 23-110 (2012 Repl.) based on claims that their due

process rights had been violated under *Brady* and that they were actually innocent and thus entitled to relief under the District of Columbia's Innocence Protection Act, D.C. Code § 22-4135 (2012 Repl.).[3]

1. Petitioners uncovered the following exculpatory evidence that had been suppressed at trial.

a. Through documents first obtained by the Washington Post, petitioners discovered suppressed evidence of an alternative perpetrator named James Blue. Specifically, in October 1984, a woman named Ammie Davis gave a statement to the police stating she had witnessed Blue murdering Mrs. Fuller. J.A. 56-58. Blue had served time in jail for assault, and had arrests for rape and forcible sodomy. Pet. App. 19a. Davis stated that, on the day of the murder, she saw Blue grab a woman and "pull her into the alley," and that he beat the "f[***] out of her" and "killed her for just a few dollars." J.A. 56-57.

Investigators took no action with regard to Davis's statement until August 1985, at which time the lead prosecutor interviewed Davis. Pet. App. 20a. Although the lead prosecutor conceded that Davis knew details of the crime, he did not believe her account, in part because Davis had previously implicated Blue in another murder, and in part because he was confident in his existing theory that the crime had been committed by a large group. *Id.* at 21a. Shortly before petitioners' trial, on October 9, 1985, Blue murdered Davis. Blue pleaded guilty to Davis's murder and died in prison in 1993. *Id.* at 22a & n.17.

b. Petitioners moved to compel discovery from the government regarding its files from the original crime.

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[3] Yarborough also sought relief for violation of his right to effective assistance of counsel, the denial of which he does not contest in this Court.

More than two months after petitioners' motion, the government notified petitioners that it would produce documents including notes made by the lead prosecutor about the case and the police department's master file. Apart from Davis's statement, the exculpatory and impeachment information that forms the basis of petitioners' claims comes from these files.

i. The lead prosecutor's notes revealed information linking a felon with a history of assaulting women to the crime scene. Although Freeman only ever referred to the two men in the alley as the "two dudes," he had identified them to police out of a photo album used by the detectives when interviewing witnesses. Accordingly, the prosecution knew that the two individuals Freeman saw were James McMillan and Gerald Merkerson. J.A. 24. As a result, McMillan was considered a suspect. J.A. 279. McMillan at first refused to talk to the prosecutor or detectives about the case. J.A. 27-28. Although it is possible that McMillan later spoke with investigators, there is no record of what he said. J.A. 279-280.

Witness statements by Speed and Tylie, two individuals who had waited with Freeman for the police, also identified McMillan as one of the two men in the alley. J.A. 26-27.[4] They both knew McMillan; in fact, Speed was dating him. J.A. 27. According to the lead prosecutor's notes, Speed saw that McMillan had "something under his coat" and thought he was "acting suspiciously." J.A. 28.[5]

Shortly after Mrs. Fuller's murder, McMillan was arrested for robbing and assaulting two other middle-aged

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[4] A fourth witness, Clayton Coleman, also told police about the two men but could not identify them by name. J.A. 23.

[5] Speed also thought that McMillan's companion, Merkerson, was putting something under his shirt, which she thought were papers. J.A. 27.

women in the same neighborhood. On October 24, 1984, McMillan attacked D.C. councilwoman Nadine Winter in an alley behind the 1100 block of K Street Northeast. The next day, he was one of two people who attacked 52-year-old Marilyn Ludwig on the 600 block of 12th Street Northeast. McMillan was arrested that day, later convicted, and sentenced to eight to twenty-five years for the assaults. Pet. App. 17a-18a & n.12.

McMillan served approximately eight years in jail for those crimes. About two months following his release, in 1992, McMillan, acting alone, forcibly sodomized and beat to death a woman in an alley three blocks from where Mrs. Fuller had been found. Pet. App. 18a-19a. The similarities between the crimes are striking. Like Mrs. Fuller, McMillan's 1992 victim was "dragged * * * through the alley" and found naked from the waist down with her sweater "pushed up." Gov't C.A. Br. 53. McMillan's victim and Mrs. Fuller both died from blunt-force trauma to the head and torso, and were subjected to "traumatic anal sodomization resulting in severe internal injuries." Pet. App. 19a. McMillan was sentenced to life without parole for this murder and remains incarcerated. *Ibid.*

ii. The prosecutor's notes and the police file also revealed that a group, including Willie Luchie, Jackie Watts, and Ronald Murphy, had been in the alley at approximately 5:30 p.m. on October 1. Pet. App. 16a. Based on statements from Luchie and Murphy, it is apparent that they did not see any group in the alley. J.A. 25, 27, 53-55. Even more significantly, at least Luchie and Watts heard "several groans" coming from the garage, and Luchie looked at the garage and observed that both doors were closed. J.A. 25, 27. As the lead prosecutor would later concede, only "one or a very few assailants" could have been in the garage with Mrs. Fuller if the doors were closed. Pet. App. 16a.

iii. Finally, the prosecutor's notes contained evidence further impeaching the testimony of various prosecution witnesses. Specifically, the notes revealed evidence that:

- Eleby was high on PCP while she met with investigators and identified photographs and suspects. Pet. App. 23a; see A1004.
- Eleby had asked her friend, Porter, to lie to police when Porter accompanied Eleby to her first meeting with investigators. Porter did as Eleby asked, falsely telling police that she heard Alston's purported confession to Eleby. J.A. 25-26; Pet. App. 22a.
- Jacobs only told investigators she had seen the crime after one of the detectives, in the presence of the lead prosecutor, "started to question her hard." A1009. This involved the detective pulling his chair close to hers, and touching and talking to the fourteen-year-old runaway "like a father," only then to pound the table and yell at her when she denied knowledge. A2476-A2480. After telling the investigators she was there, she immediately "tried to back out" of what she had said, and "vacil[l]ated back and forth" in subsequent meetings with prosecutors. A1009.
- Investigators had sought to corroborate Thomas's testimony by speaking with his aunt, whom Thomas had said he had talked to immediately after witnessing the crime. She did "not recall [Thomas] ever telling her anything such as th[at]." A1006.

2. At the post-conviction hearing, petitioners called Harris's trial counsel, Michele Roberts, who was widely

regarded as one of Washington's best trial lawyers. See Kim Eisler, *Need a Good Lawyer?*, Washingtonian Mag. (Apr. 1, 2002). Ms. Roberts testified that she was not aware of the withheld alternative-perpetrator or impeachment information described above, and that she would have found the evidence helpful to the defense. A2254-A2272. She explained that the evidence pointing to alternative perpetrators would have enabled her to "present evidence offering a counter narrative * * * that would have been particularly helpful, especially given how the community at large and presumably the jury as well emotionally responded" to the crime. A2255.

Petitioners supported the suppressed evidence with expert testimony from a state chief medical examiner and a violent-crime-scene expert who worked for a state police department for 26 years.[6] Both testified that within a "reasonable degree" of certainty, the crime was more likely committed by one to three people than the large group portrayed by the prosecution. See A2132-A2133, A2142, A2229, A2238-A2239.

The medical examiner and crime-scene expert had several grounds for their conclusions. *First*, Mrs. Fuller was found in an undisturbed pool of blood, and no blood was found elsewhere. A2233-2234. The crime-scene expert explained that this showed that Mrs. Fuller was sexually assaulted where her body was found. A2237. The government subsequently conceded that point. A2603. *Second*, both experts explained that the injuries Mrs. Fuller sustained from the beating were localized to her head and right torso, whereas group attacks usually present injuries across a greater portion of a victim's body.

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[6] In 2015, the medical examiner lost his position and pleaded no contest to charges that he used his state office for private gain because he had used state resources in his private consulting business.

A2142, A2244. And, *third*, the crime-scene expert found the pattern of Mrs. Fuller's clothes significant: a group likely would have pulled at, torn, and scattered Mrs. Fuller's clothes in a "frenzy," but Mrs. Fuller's clothes were undamaged and many were near her body. A2239, A2247.

The expert witnesses also explained how the purported eyewitnesses had given accounts flatly inconsistent with the objective crime-scene evidence. Alston said in his statement, for example, that Mrs. Fuller had been struck by a 2x4 in the back of the head. A1154. But there were no injuries to the back of her head, let alone injuries consistent with being struck by a 2x4. A2134, A2146. Bennett testified in the grand jury that someone punched Mrs. Fuller in the chin so hard that she lost consciousness. A1872. But Mrs. Fuller had no injuries consistent with having been punched in the chin. A2146-A2148. And three of the four purported eyewitnesses to the sexual assault—Alston, Bennett, and Eleby—testified at trial that Mrs. Fuller's legs were held down. A410-411, A497-498, A553-554.[7] Yet the objective medical evidence showed no restraint marks on her legs or elsewhere. A2240-A2242.

Finally, the medical examiner compared the medical evidence surrounding McMillan's 1992 murder to Mrs. Fuller's murder, noting that both victims had injuries from the sodomy that were "similar," "unusual," and "rare." A2179-A2180.

3. All but one of the living purported eyewitnesses—Alston, Bennett, Jacobs, and Montgomery—took the stand. Pet. App. 12a-16a. Alston and Bennett recanted their testimony, stating that they had felt compelled to

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[7] The fourth, Jacobs, said that she did not recall one way or the other. A1968.

give statements by the detectives' heavy-handed interrogation techniques, and that the detectives had suggested information to them. Bennett further testified, implausibly, that he once said into the camera that he was lying, which was then recorded over. *Id.* at 13a. Yarborough also took the stand to recant the contents of his videotaped statement.[8] *Id.* at 65a-67a. The government responded by calling the two lead detectives, both of whom denied giving the witnesses information but admitted to applying pressure to the witnesses. *Id.* at 14a-15a & n.11.

Jacobs and Montgomery also testified. Jacobs asserted that her trial testimony had been false because she had not been in the alley when the crime occurred. Pet. App. 15a. She nevertheless "broke down emotionally" when asked to explain how Mrs. Fuller's murder made her feel. *Id.* at 16a. And although Montgomery had previously signed an affidavit recanting his testimony, he took the stand and denied committing perjury in the original trial. *Id.* at 15a.[9]

4. The Superior Court denied petitioners' motions. Pet. App. 81a-131a. It did not find the recantations credible. *Id.* at 110a. It held that the alternative-perpetrator evidence was not material because a jury either would have not credited it or would have assumed that the alternative perpetrators had simply been additional participants in the group attack. *Id.* at 123a. It did not address

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[8] Yarborough further testified that one of the detectives knocked him out of his chair and shoved him into a file cabinet, injuring his knee. While Yarborough was indeed sent to the hospital that evening for a knee injury, he stated on the videotape that he had been injured playing basketball. The detectives denied Yarborough's claims. Pet. App. 15a.

[9] Montgomery had only seven months left on a ninety-eight-month drug sentence when he testified. J.A. 254.

the testimony regarding the witnesses in the alley. Finally, the court reasoned that the impeachment evidence was not material because the prosecution's witnesses had already been heavily impeached on other grounds. *Id.* at 124a-127a & nn.23-24.

5. The District of Columbia Court of Appeals affirmed. Pet. App. 1a-78a.

With regard to petitioners' *Brady* claims, the court concluded that the evidence regarding McMillan; Davis's statement implicating Blue and the police's mishandling of it; the statements from the witnesses in the alley; and the additional impeachment evidence (except for the evidence regarding Jacobs's interactions with investigators) had been suppressed and were favorable to the defense. Pet. App. 48a; see *id.* at 22a n.18.[10]

The D.C. Court of Appeals concluded that McMillan's October 1984 assaults could have been used at trial to present an alternative-perpetrator defense under *Winfield* v. *United States*, 676 A.2d 1 (D.C. 1996) (en banc). Pet. App. 33a-36a. The court decided, however, that it could not consider the 1992 murder in evaluating the materiality of the suppressed evidence regarding McMillan because the murder occurred after the trial in this case. *Id.* at 36a-37a.

As to the group in the alley at 5:30 p.m., the court again acknowledged that the evidence was helpful to the defense. Nevertheless, it concluded the evidence was not material, noting that a jury probably would have expected there to be "more noise" if the attack was ongoing and

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[10] The court of appeals rejected petitioners' arguments that the prosecution withheld additional categories of evidence impeaching Eleby and Alston. See *id.* at 22a n.18, 23a. Petitioners are not challenging those determinations.

would have thought Luchie was mistaken about seeing the doors to the garage closed. Pet. App. 32a.

The D.C. Court of Appeals also held that Davis's statement implicating Blue was inadmissible hearsay. Although it conceded the statement was admissible for the purpose of criticizing the thoroughness of the government's investigation, it concluded that the statement's "impact would have been negligible." Pet. App. 42a-44a. The court similarly reasoned that the suppressed impeachment evidence would have had little impact with the jury. *Id.* at 45a.

The court then sought to consider the evidence as a whole. Pet. App. 48a-53a. While acknowledging that the prosecution witnesses "contradicted themselves and each other," the court reasoned that the jury ultimately had found "the government's witnesses credible." *Id.* at 49a-50a. It further reasoned that, because the suppressed evidence challenged "the basic structure of how the crime occurred," "the burden on appellants to show materiality [was] quite difficult." *Id.* at 54a. The court asserted that petitioners bore the burden of showing "a reasonable probability" that the jury would have "doubt[ed] *virtually everything*" offered by the prosecution's purported eyewitnesses. *Ibid.* Applying that standard, the court affirmed the denial of relief under *Brady*. *Id.* at 78a.[11]

6. The D.C. Court of Appeals subsequently denied petitioners' motion for rehearing. Pet. App. 79a-80a.

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[11] The court further affirmed the denial of petitioners' actual-innocence claim on the grounds that the Superior Court had not found the recantations credible and that McMillan's 1992 sodomy murder did not prove he murdered Mrs. Fuller without the involvement of petitioners. Pet. App. 56a-62a. Petitioners are not challenging that conclusion in this Court.

SUMMARY OF ARGUMENT

This case involves the application of the Court's well-established standard for determining whether suppressed evidence was material to a criminal defendant's guilt or punishment, such that the suppression of that evidence would violate the defendant's due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963). That standard asks simply whether there is a reasonable probability that the suppressed evidence, considered collectively, would have affected the outcome. *E.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 433-437 (1995).

The suppressed evidence in this case is of a type and importance that is rarely seen in criminal trials. There is accordingly not just a reasonable probability, but a profound likelihood, that the suppressed evidence would have affected the jury's verdict.

The analysis of the suppressed evidence begins with one of the most useful types of evidence that exists for a criminal defendant: evidence that someone else committed the crime. Numerous witnesses told police that another man, James McMillan, had been seen acting suspiciously at the crime scene. By the time of petitioners' trial, McMillan had pleaded guilty to assaulting and robbing two middle-aged women in the same neighborhood shortly after Mrs. Fuller was attacked. To state the obvious, that information would have been exceedingly useful evidence to petitioners, who were on trial for a murder that the prosecution claimed began as an assault and robbery of a middle-aged woman.

What is more, the prosecution further suppressed evidence indicating that the crime was committed by one or two people, rather than by a large group. Consistent with McMillan's having committed the murder, but not with petitioners' having done so, a group of witnesses walked by the garage at the estimated time of death and did not

see any evidence that a group was present. Instead, they heard groans coming from the garage where Mrs. Fuller's body was found. Critically, one witness saw that both garage doors were closed. Because one of the doors was open when Mrs. Fuller's body was discovered, that witness's testimony would have given rise to a strong inference that the killer was inside the garage at the time with Mrs. Fuller.

The evidence implicating McMillan would have created an alternative theory of the crime, which would have been supported by the statements from the witnesses in the alley indicating that Mrs. Fuller was killed by one or two people. If this suppressed evidence had been available to petitioners, who would have further corroborated it with the objective crime-scene evidence, it surely would have given rise to reasonable doubt on the part of the jury. At a minimum, there is unquestionably a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012) (quoting *Cone* v. *Bell*, 556 U.S. 449, 469-470 (2009)).

To be sure, the prosecution presented at trial purported eyewitness accounts, including the testimony of two individuals who pleaded guilty to lesser charges in exchange for their testimony. But the testimony of those witnesses and others were so riddled with inconsistencies that, even without hearing petitioners' alternative account of the crime, the jury still acquitted two defendants and initially deadlocked as to Overton and Christopher Turner.

The jury's confidence in the prosecution's investigation and its witnesses would have been further eroded by two additional categories of suppressed evidence. First, the prosecution withheld the police department's mishan-

dling of a potential lead on another alternative perpetrator. That mishandling would have called into question the effectiveness of the police investigation, especially given the problematic testimony upon which the prosecution relied. Second, the prosecution suppressed additional impeachment information that would have caused the jury to question the validity of the testimony of many of the purported eyewitnesses.

The obvious materiality of the withheld evidence is further underscored by McMillan's subsequent commission of a strikingly similar crime. That crime further confirms that petitioners could have developed evidence implicating McMillan in Mrs. Fuller's murder. At a minimum, in evaluating the justice of petitioners' convictions, the Court should take into account the similarities between the crimes.

ARGUMENT

THE FAILURE OF THE PROSECUTION TO DISCLOSE EXCULPATORY AND IMPEACHMENT INFORMATION VIOLATED PETITIONERS' RIGHTS TO DUE PROCESS BECAUSE THE INFORMATION WAS MATERIAL TO THE ISSUE OF GUILT

A. Due Process Requires The Prosecution To Disclose All Favorable Information Material To The Defense

1. Our criminal justice system places "trust in the prosecutor as 'the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Kyles*, 514 U.S. at 439 (alterations omitted) (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)). "It is as much his duty to refrain from improper methods * * * as it is to use every legitimate means to bring about a just [conviction]." *Berger*, 295 U.S. at 88.

Part of the prosecutor's "special role * * * in the search for truth in criminal trials" involves "a limited departure from a pure adversary model." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999); *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985). Under the familiar principle of *Brady* v. *Maryland*, 373 U.S. 83 (1963), the prosecutor must provide to the defense evidence that is favorable and material to the defendant's guilt or punishment, "regardless of request" by the defense. *Kyles*, 514 U.S. at 432-433. Any failure to do so, "irrespective of the good faith or bad faith of the prosecution," "violates due process." *Brady*, 373 U.S. at 87.

The Court has previously observed that a claim based on a violation of a defendant's due process rights under *Brady* has three elements. The first is that the evidence is "favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler*, 527 U.S. at 281-282. This element is not a demanding one; so long as the evidence has the capacity, in the context of the trial, to "work against the State, not for it," the evidence will satisfy this first element. *Kyles*, 514 U.S. at 451.

Second, "the evidence must have been suppressed" by the government. *Banks* v. *Dretke*, 540 U.S. 688, 691 (2004) (internal quotation marks omitted). For *Brady* purposes, "suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood* v. *West Virginia*, 547 U.S. 867, 869-870 (2006) (per curiam).

The third element is that the favorable, suppressed evidence must be "material." *E.g.*, *Kyles*, 514 U.S. at 433-434. And evidence is material for purposes of *Brady* when "there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (quoting *Giglio* v. *United*

States, 405 U.S. 150, 154 (1972) (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959))).

2. This case, like the Court's other most recent cases involving *Brady*, turns on the issue of materiality. See, *e.g.*, *Wearry*, 132 S. Ct. at 1006; *Smith*, 132 S. Ct. at 630. Materiality does not require that the defendant "would more likely than not have received a different verdict with the evidence." *Kyles*, 514 U.S. at 434. Rather, the Court need only find that "the likelihood of a different result is great enough to 'undermine confidence in the outcome of the trial.'" *Smith*, 132 S. Ct. at 630 (alteration omitted) (quoting *Kyles*, 514 U.S. at 434). And, because *Brady* applies exclusively to criminal trials, "a different result" means only the jury retaining reasonable doubt—that is, not reaching a subjective state of near certitude of guilt. *Victor* v. *Nebraska*, 511 U.S. 1, 15 (1994); see *In re Winship*, 397 U.S. 358, 363 (1970) (noting reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error").

In crafting the materiality standard, the Court has been cautious "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440. For a court to conclude that withheld evidence is not material, the question is not whether a jury "*could* have disbelieved" the withheld evidence; a court must instead have "confidence that it *would* have done so." *Smith*, 132 S. Ct. at 630.

Finally, a court considers the suppressed evidence "collectively, not item by item." *Kyles*, 514 U.S. at 436-437. And it evaluates that evidence "in the context of the entire record"—that is, "the existing or potential evidentiary record." *United States* v. *Agurs*, 427 U.S. 97, 112 (1976); *Kyles*, 514 U.S. at 439. Accordingly, "additional

evidence of relatively minor importance" can be material in comparatively weak cases. *Agurs*, 427 U.S. at 113.

3. In recent years, the Court has twice reversed state court judgments that have misapplied the *Brady* materiality standard. See *Wearry*, 136 S. Ct. 1002; *Smith*, 132 S. Ct. 627.

In *Smith*, the Court considered the case of a man convicted of a group murder on the strength of an eyewitness identification. After trial, defense counsel found police notes indicating that on the day of the murder that eyewitness told an officer that he could not identify any of the perpetrators. However, notes made by other officers that evening indicated that the witness could not identify any of the perpetrators *except for one*—the lead perpetrator who had not been wearing a mask—whom he later identified as the defendant. See 132 S. Ct. at 629-630. After looking at 14 photo arrays over many months, the eyewitness never made an identification until the day he was shown a picture of the defendant, at which point he said, "This is it. I'll never forget that face." *Id.* at 632 (Thomas, J., dissenting). Nevertheless, the Court refused to "speculate about" which of the competing factual propositions a jury would have endorsed, and deemed the suppressed evidence material. *Id.* at 630 (opinion of the Court).

In *Wearry*, the Court summarily reversed a state court's application of *Brady* based on withheld impeachment evidence. There, the state withheld evidence that a main prosecution witness had testified because he held a grudge against the defendant, that the same witness had given testimony that was contradicted in part by disputed medical evidence, and that another witness had sought a deal to shorten his sentence in exchange for testimony. See 136 S. Ct. at 1004-1005. The state could nevertheless point to untainted witnesses who testified that the defendant had been driving the victim's car, which had blood on

it, and that the defendant had sought to sell them personal items belonging to the victim. See *id.* at 1010-1011 (Alito, J., dissenting). Nevertheless, the Court admonished the state court for having "emphasized reasons a juror might disregard new evidence while ignoring reasons she might not," and reversed. *Id.* at 1006-1007 (opinion of the Court).

This case presents the same types of errors the Court identified in *Smith* and *Wearry*. The D.C. Court of Appeals repeatedly focused on reasons why a jury could have disregarded the suppressed evidence. And, it engaged in those inferences despite petitioners' presenting highly exculpatory evidence on the basis of which a jury could well have found reasonable doubt. The court of appeals' rejection of petitioners' *Brady* claims was erroneous, and its judgment should therefore be reversed.

B. The Prosecution Suppressed Favorable Information Material To Petitioners' Defense

1. The Prosecution Suppressed Evidence Indicating That Someone Else Committed The Murder

It is hard to conceive of more quintessentially exculpatory evidence than evidence that someone else committed the crime. See, *e.g.*, *Kyles*, 514 U.S. at 429. In this case, the prosecution withheld evidence that James McMillan, a serial assaulter of women like the victim, had been seen acting suspiciously at the crime scene.

a. McMillan would have been a compelling suspect if petitioners had evidence linking him to the crime scene. He lived "three doors down from the alley" on Eighth Street. Pet. App. 17a. And, by the time of petitioners' trial, McMillan was serving a lengthy prison sentence for violent assaults of middle-aged woman whom he assaulted "in the same neighborhood in the span of less than a month" after Mrs. Fuller's death. *Id.* at 36a.

Those assaults were not standard purse snatchings. In one attack, he broke the victim's nose. In the other, although his assault was interrupted by two painters who chased him away, his attack was so violent that the victim (a D.C. councilwoman) yelled "murder" and "didn't realize at first that he was trying to snatch [her] purse." Marcia Slocum Greene & Alfred E. Lewis, *Councilwoman Winter Mugged, She Suffers Minor Injuries in Street Robbery*, Wash. Post, Oct. 25, 1984, at C1. McMillan "punched [her] in the face and kept beating and beating [her] * * * * and knocked [her to] the ground." *Ibid.*

b. Not only was McMillan observed at the crime scene, but his behavior there was self-evidently suspicious. According to Freeman, McMillan and his confederate had been acting suspiciously throughout the day, which they spent walking "up and down H street." A237, A1357. Then, shortly after Freeman discovered Mrs. Fuller's body, the two men ran into the alley only to suddenly stop "at the corner by the garage." A215, A1357. Neither man spoke to Freeman or inquired about why he was standing by the garage. Instead, they just "look[ed] around" for "about five minutes," while McMillan held something under his coat. A1357. Even McMillan's girlfriend told police he was "acting suspiciously." J.A. 28. In fact, McMillan's behavior was so strange that she "started to call out to" him but neither said anything. J.A. 26. When the police arrived, one of the two men told the other not to run, but they ran anyway. A1357.

A jury would have seen this behavior as strongly tending to inculpate McMillan. Indeed, it may well have surmised that McMillan had the object used to assault Mrs. Fuller under his jacket. The government would not have been able to directly contest those inferences, as detectives had put Harris in a lineup in the hope that Freeman

would identify him as one of the two men Freeman had seen.

c. The D.C. Court of Appeals hypothesized that the jury may have concluded that McMillan was just another member of the large group of perpetrators identified by the government witnesses. Pet. App. 51a. A court's ability to craft such outcomes does not render the McMillan evidence any less material. See *Smith*, 132 S. Ct. at 630. In any event, it would have been odd for the jury to reach such a conclusion. After all, Freeman, Tylie, and Speed did not see McMillan at the garage with one or more of the defendants. And McMillan attacked Councilwoman Winter by himself and attacked Ms. Ludwig with one other person. There is no valid reason to assume that the jury would have concluded that McMillan participated in a group assault on this occasion when he had not done so in committing other, similar crimes.

2. The Prosecution Suppressed Witness Statements Indicating Mrs. Fuller Was Killed By One Or Two People

The prosecution further withheld highly exculpatory evidence indicating that the prosecution's group-attack theory was false.

a. At petitioners' trial, they were not aware that a group of at least four people walked through the alley at approximately 5:30 p.m., which is Mrs. Fuller's estimated time of death. A712. The statements taken from two members of this group indicate that at least Luchie and Watts heard groans coming from the garage, which the D.C. Court of Appeals acknowledged "undoubtedly" belonged to Mrs. Fuller. J.A. 25, 27, 53-54; Pet. App 50a. A jury would readily infer that Mrs. Fuller was therefore not only alive, but conscious, in the garage as these witnesses walked through the alley.

The natural inference from these statements is that the group heard Mrs. Fuller being attacked. Because petitioners did not see any group present in the alley, these statements directly suggest that Mrs. Fuller was not killed by a group.

That inference is strongly reinforced by Luchie's statement that, in response to hearing the groans, he looked at the garage and observed that both doors were closed. J.A. 25. As the lead prosecutor conceded during the post-conviction proceedings, it would have been impossible for a large group to have been in the garage with Mrs. Fuller with the doors closed. Pet. App. 16a. Moreover, the uncontradicted evidence is that, when Freeman came upon the garage approximately a half-hour later, one of the doors was open—suggesting that Mrs. Fuller's one or two assailants were in the garage with her when Luchie passed by the garage. Pet. App. 4a, 32a.

b. The D.C. Court of Appeals sought to minimize this evidence, but its efforts to do so were circular. The court determined that "the fact that Watts and Luchie heard nothing else and saw no signs of any activity more likely indicated that the assault was over and that the assailants were gone." Pet. App. 50a. But that depends on the assumption that Mrs. Fuller died from a group attack. Absent that assumption, what Watts and Luchie heard is completely consistent with an assault having been in progress, especially one that followed the victim having been beaten.

As to Luchie's seeing both doors closed, the court ventured the hypothesis that the jury would have concluded that Luchie was mistaken, or that someone else peeked in the garage and left the door open between Luchie's observation at 5:30 and Freeman's arrival at 6:00. Pet. App. 50a. A prosecutor could offer those rationales to a jury,

but there is little reason a jury would believe them, especially given the evidence the jury would have heard regarding McMillan.

3. *The Suppressed Evidence Regarding A Different Perpetrator And From Witnesses Who Had Been In The Alley Supports An Alternative Theory Of The Crime*

As is often the case with suppressed, favorable information, the preceding categories of evidence "would not have functioned as mere isolated bits of good luck" for petitioners. *Kyles*, 514 U.S. at 449 n.19. Petitioners would have used McMillan's background and suspicious behavior at the crime scene to argue he was the real perpetrator. And that alternative theory would have been buttressed by the observations from the witnesses who had been in the alley at the estimated time of death. That is, petitioners would have told the jury that McMillan, perhaps with an accomplice, killed Mrs. Fuller and that he was in the garage completing the crime when Luchie heard groans emanate from the garage and saw the doors were closed.

The strength of the inference that McMillan was the real killer is underscored by the D.C. Court of Appeals' attempt to minimize it. In an effort to reconcile both the Luchie evidence and the evidence of McMillan's suspicious behavior with the prosecution theory of a group assault, the court invented a scenario in which McMillan happened upon the garage and decided to look in during the half-hour window between when Luchie and Murphy left the alley and Freeman arrived. Pet. App. 51a. But that attempt at reconciliation does not work, because it does not explain why McMillan would anxiously return to the garage and stand around suspiciously after. The court sought to answer that in a footnote, contending that it would "explain[] his suspicious behavior" if McMillan

"heard about the attack and decided to look in out of curiosity" only to then further decide to "carr[y] away something from the garage." *Id.* at 51a n.81. That a court would discuss such peculiar possibilities itself shows the inferential force of petitioners' alternative theory.

a. What is more, an important portion of the evidentiary record—the objective crime-scene evidence—is consistent with McMillan's guilt and petitioners' innocence. See *Kyles*, 514 U.S. at 439; *Agurs*, 427 U.S. at 112. The unrebutted testimony from two experts supports the proposition that Mrs. Fuller was killed by one to three people. They based this opinion on evidence such as the nature and distribution of Mrs. Fuller's injuries and the condition of her clothes. See pp. 22-23, *supra*.

Most importantly, the forensic evidence indicates, and the government has now conceded, that Mrs. Fuller was sexually assaulted where her body was found, in a cramped corner of the garage, with her body at most a foot from the garage door and perhaps two feet from the side of the garage with an upright shoeshine box near her head. J.A. 30; see pp. 3-4, *supra*.

The location itself suggests that only one or two people were involved in the sexual assault. The prosecution theory at trial was that one person committed the sodomy while two defendants held Mrs. Fuller's legs, and five other defendants were close to her body. J.A. 155. But there was simply no room for three people, much less eight, where her body was found. It is no surprise, therefore, that the lead prosecutor told the jury that Mrs. Fuller's body was moved to the corner of the garage after the assault. J.A. 156. Not only was that the only way to make sense of a group attack in light of the crime scene,

but Alston, Bennett, and Eleby gave testimony inconsistent with the sexual assault occurring where the body was found. A508, A550-553, A1090-1091.[12]

In evaluating materiality, this Court has held that "considerable forensic and other physical evidence linking petitioner to the crime" suggests that withheld evidence will not be material. *Strickler*, 527 U.S. at 293; see *Wood* v. *Bartholomew*, 516 U.S. 1, 3 (1995) (per curiam). In *Strickler*, for example, hair recovered from the crime scene and fingerprints recovered from the victim's car matched the defendant's, and even the "character of the fatal injuries to the victim" strongly supported the jury's verdict. 527 U.S. at 293 & n.41.

Conversely, a *lack* of forensic evidence indicates that withheld evidence is *more* likely to be material. See, *e.g.*, *Banks*, 540 U.S. at 701. Here, moreover, the Court is not

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[12] The court of appeals suggested that petitioners could have used the physical evidence to mount a theory that Bennett and Alston committed the murder together. Pet. App. 52a n.82. That does not diminish the support the objective crime-scene evidence provides for the alternative theory that McMillan committed the murder; the crime-scene evidence is part of the record against which the withheld evidence is measured. *Agurs*, 427 U.S. at 112. In any event, the notion that Bennett and Alston committed the murder alone would have been implausible, as neither had criminal histories of assault and indeed neither even knew the other at the time of the murder. A1566 (Bennett); Joint Hr'g Ex. 76 (Alston); 11/5/85 Afternoon Tr. at 140-141 (A5943-A5944). Nor would a theory that Bennett and Alston committed the murder alone have made sense of the objective crime-scene evidence, as both gave testimony that is thoroughly inconsistent with it. It is therefore telling that only one petitioner's trial counsel attempted such an argument in front of the jury, floating the idea in closing that Bennett and Alston committed the crime and that Alston conspired with Eleby and Jacobs to frame others in advance of Eleby's speaking with detectives. J.A. 173-179.

simply confronting a lack of inculpatory physical evidence; the objective crime-scene evidence actually *supports* the materiality of the withheld evidence.

b. i. At base, a trial with the suppressed evidence would have consisted of two competing theories of how Mrs. Fuller was killed. The prosecution would have presented its case through its purported eyewitnesses, vulnerable young people whose testimony contradicted each other and their own previous statements. The defense would have presented the testimony of Freeman, Speed, Tylie, Luchie, Murphy, and Watts to support the theory that McMillan committed the crime. That testimony would have been supported by McMillan's criminal history and the objective crime-scene evidence.

Although petitioners present a far more coherent theory of the crime, the Court need not so conclude to find the evidence supporting it material. See, *e.g.*, *Smith*, 132 S. Ct. at 630. Instead, the question is only whether there exists a reasonable probability of a different result: *i.e.*, that the alternative theory would have given rise to reasonable doubt. *Ibid.* The answer to that question is surely "yes," especially when petitioners' alternative theory is considered without "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry*, 136 S. Ct. at 1007.

ii. Just as was the case in *Smith*, the prosecution theory and petitioners' alternative theory present two propositions that "directly contradict" each other. 132 S. Ct. at 630. The evidence supporting each proposition need not be in equipoise in order to grant relief under *Brady*. In *Smith*, for example, the withheld evidence impeached the trial testimony of the key eyewitness who had implicated the defendant by showing that, on the night of the crime, he had expressed doubt about being able to identify any of his assailants. *Id.* at 629. Not only was there other

evidence from that night indicating that the witness could identify the first assailant (whom he later identified as the defendant), *id.* at 630, but the witness gave confident testimony under cross-examination about his identification, telling the jury, "I picked out the person I seen come in that house that held a gun to my head and under my chin." *Id.* at 634 (Thomas, J., dissenting).

Nevertheless, petitioners' "jury would have been entitled to find" that the alternative theory better explains what happened to Mrs. Fuller. *Kyles*, 514 U.S. at 453. Accordingly, the existence of contradictory propositions, each supported by substantial evidence, itself "undermines confidence" in petitioners' convictions. *Smith*, 132 S. Ct. at 631.

iii. The alternative theory would have fundamentally changed the dynamics of petitioners' trial, even more so than the withheld evidence would have affected the trial in *Kyles*, the Court's other *Brady* case involving suppressed evidence of an alternative perpetrator. In *Kyles*, the prosecution suppressed information that the alleged alternative perpetrator (known as "Beanie") had told police to search Kyles's home and garbage for evidence tying him to the crime, which had resulted in the discovery of the victim's possessions as well as the gun used to commit the murder. See 514 U.S. at 427-428, 447-449. The jury in *Kyles* was well aware of Beanie; Kyles's defense was that Beanie had framed him. See *id.* at 429. In fact, the prosecution's rebuttal was to put Kyles and Beanie next to each other and to have four eyewitnesses identify Kyles, not Beanie, as the perpetrator. See *id.* at 431.[13]

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[13] The other chief category of suppressed information in *Kyles* was evidence impeaching the testimony of two of the four eyewitnesses. See 514 U.S. at 441-444. In this case, the purported eyewitnesses

In petitioners' trial, by contrast, the jury heard neither petitioners' alternative theory nor any other serious alternative-perpetrator theory because the prosecution had suppressed the evidence supporting it: McMillan's presence at the crime scene, the statements of witnesses not seeing a group in the alley, and the closed garage doors at the time of Mrs. Fuller's death. Moreover, the prosecution's suppression of plausible alternative perpetrators gave rise to the "not me, maybe them" defense, in which defense counsel rehabilitated prosecution witnesses who had not identified their clients. See pp. 14-15, *supra*.

Accordingly, petitioners' defense with the suppressed evidence supporting the alternative theory would have borne little resemblance to the defense petitioners presented at their original trial. With the withheld evidence, the jury would have been confronted with a credible, competing theory of the crime, supported by disinterested witnesses and objective crime-scene evidence. Such a defense undoubtedly would have cast "the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

c. Suppressed evidence of an alternative perpetrator would create a reasonable probability of a different result in most cases. This case, however, was a close one that, in the prosecutor's own words, "easily could have gone the other way." A1751. The jury in petitioners' trial deliberated for seven days—a significant amount of time even for a murder case. And, when the jury did return verdicts, it initially announced a split verdict with two acquittals, six convictions, and a deadlock as to Christopher Turner and

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were already thoroughly impeached at trial and, in any event, additional impeachment information of many of the witnesses was also withheld. See pp. 46-48, *infra*.

Overton. Pet. App. 10a-11a. The jury would deliberate as to those two defendants for an additional two days, during which they took between 40 to 50 votes before convicting both men.[14] Accordingly, even evidence of minimal importance would satisfy the materiality requirement in this case. *Agurs*, 427 U.S. at 113.

Petitioners' alternative theory far exceeds that low threshold for the reasons given above. It also "would have complemented" the evidence at trial impeaching the prosecution's witnesses, and thus further undermined them in the eyes of the jury. *Kyles*, 514 U.S. at 449 n.19. In petitioners' original trial, the prosecution's theory of how the crime occurred went largely unchallenged. Petitioners' alternative theory would have broadened the factual dispute such that the jury would have considered the foundational question of how Mrs. Fuller was killed. In answering that question, the jury would have considered the objective crime-scene evidence and a plausible alternative account of the crime, both of which contradict the account given by the prosecution witnesses. This would have led the jury to seriously consider that those witnesses had given such confused accounts because they were attempting to describe something that they had not seen.

Jurors at the time would not have been surprised that the "young" and "not very smart" witnesses had decided to tell the detectives what they thought the detectives

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[14] To be sure, in a footnote in its decision on petitioners' direct appeal, the D.C. Court of Appeals stated that the evidence of guilt was "overwhelming." See *Catlett* v. *United States*, 545 A.2d 1202, 1206 n.2 (D.C. 1988); Pet. App. 123a, 129a. As in *Kyles*, however, what matters is the impact of the suppressed evidence—not whether a lower court described the evidence as "overwhelming." See *Kyles* v. *Whitley*, 5 F.3d 806, 807, 816-817 & n.16, 820 (5th Cir. 1993), rev'd, 514 U.S. 419 (1995); *id.* at 859-861 (district court opinion).

wanted to hear. J.A. 193. It was obvious that the prosecution's witnesses had not appreciated what the ramifications would be when they talked to police, either for themselves or for the people they identified. The lead prosecutor has admitted, for example, that Eleby and Jacobs "never took this seriously * * * * [and] it was very hard to get them to see * * * that what they were going to say really affected the lives of people." A1736. Alston thought that he would be "a free man" after giving his statement to police. A1175. And Bennett, who was in a love triangle with his ex-girlfriend, Trina Ward, and Rouse, first told detectives that Ward had participated in the murder only to reverse course after they got back together. 11/6/85 Tr. at 127-129 (A6105-A6107). Given the evidence pointing to McMillan, the jury would have entertained the possibility that the prosecution witnesses had made bad decisions to give false statements to the detectives, resulting in testimony in which speculation cobbled together from the detectives' questions, neighborhood rumors, and press coverage was passed off as first-hand observation.

4. The Prosecution Suppressed Additional Information That Cast Doubt On The Investigation And Impeached Its Witnesses

The jury would have been more willing to discount the prosecution's witnesses if it had learned of two additional categories of suppressed evidence that would have undermined the prosecution's investigation and impeached its witnesses.

a. The first category is Davis's statement inculpating Blue and the police department's subsequent bungling of that statement, which would have given petitioners' counsel "a vigorous argument that the police had been guilty of negligence." *Kyles*, 514 U.S. at 447.

i. Davis identified Blue as the assailant on October 26, 1984. Yet prosecutors and detectives investigating the Fuller murder did not learn of Davis's account until August 1985. Pet. App. 20a. In other words, at least nine months passed between a witness giving the police a potential eyewitness account of the crime and the police doing anything about it.

The jury would not have been impressed with the government's explanation for not investigating Davis's account sooner. Jurors would reasonably expect that a potential eyewitness account of such a high-profile murder would not get "lost in the shuffle." A2308. Even the prosecutor realized that the police had mishandled the Blue lead. As he admitted in the post-conviction hearing, his meeting with the detectives once the Davis report resurfaced had "a certain amount of tension"; the prosecutor was not "very happy that no one had paid attention to the report." A2311.

One would expect the jury to have agreed. In light of the suppressed evidence, and given the impeached testimony of the prosecution's witnesses, the jury would have harbored concerns that other leads had not been pursued. The jury would have wondered what the detectives could have learned if they had investigated Davis's statement. Indeed, the detectives' failure to investigate Blue would have crystalized in the jurors' minds the detectives' failures regarding McMillan, given that McMillan was arrested for assaulting Ms. Ludwig the day before Davis gave her statement.

ii. Davis's statement inculpating Blue would also have contradicted one of the prosecution's principal themes. In his final statement to the jury, the lead prosecutor sought to overcome the challenges to the credibility of the prosecution's witnesses by telling the jury it had heard *all* of

"the witnesses who came forward or were brought forward" through "an exhaustive and intense police investigation." J.A. 239. Yet that omitted Davis, who had come forward with a statement that the police did not act on.

Accordingly, even without the evidence supporting petitioners' alternative account, Davis's statement would have shown the jury that there was more to this case than the prosecution suggested. Especially given the flaws in the testimony from the prosecution's witnesses, the existence of relevant testimony outside those witnesses' accounts would naturally have given the jurors doubts about petitioners' guilt.

b. i. The jurors' doubts would have been exacerbated by additional impeachment evidence that the prosecution withheld regarding the three purported eyewitnesses who had not signed plea agreements with the government—Eleby, Jacobs, and Thomas—as well as another witness, Porter, whose testimony indirectly supported the prosecution's group-attack theory. In particular, the prosecution suppressed evidence of the following:

- Eleby regularly used PCP, and was high when she met with investigators to identify participants in the crime.
- At Eleby's request, Porter lied to investigators and told them that she was in the car with Eleby and Alston when Alston purportedly confessed to Eleby.
- Detectives used unusual techniques during Jacobs's interviews, and Jacobs immediately recanted having seen the crime and continued to vacillate about whether she witnessed the crime.

- The one person Thomas identified who could corroborate his purported eyewitness account, his aunt, told police she could not.

The court of appeals determined that the prosecution suppressed all of that evidence, with the exception of the evidence regarding Jacobs. Pet. App. 22a-23a. As to the Jacobs evidence, the court determined that "the defense knew of Jacobs's denials [of witnessing the crime], because she was asked about [them] on cross-examination." *Id.* at 22a n.18. Although Jacobs was impeached with her initial denials of having witnessed the crime, she was not confronted with the withheld evidence that, immediately after her statement to detectives and on subsequent occasions thereafter, she recanted her statement. Nor did the jury hear about the unusual manner in which her statement was extracted from her.

ii. The court of appeals essentially adopted the government's position below that Eleby, Jacobs, and Porter were impeached so often, and in so many ways, that any additional impeachment would have had little effect. Pet. App. 46a-47a; Gov't C.A. Br. 105-110. But the government cannot have it both ways: if the government intends to argue that Eleby's, Jacobs's, and Porter's testimony is relevant to the materiality analysis insofar as their testimony generally corroborates a group-attack theory, as the court of appeals suggested, see Pet. App. 49a, then additional impeachment of them is hardly inconsequential.

That is especially true given the nature of the impeachment evidence. A jury would have had doubts about Eleby's entire testimony if it learned that she was high on PCP when she met with investigators. Similarly, a jury would have questioned Jacobs's testimony if it knew that she was harassed into giving a statement and then repeatedly told detectives it was a lie. Nor would a jury have credited Porter's testimony that one of the petitioners

confessed to her if it had learned that she originally had told police essentially the same story about someone else—and even that original statement was a lie. Indeed, the fact that Porter agreed to tell that lie because her friend, Eleby, asked her to would have further eroded the credibility of Eleby and Jacobs as well, as they were friends who testified to witnessing the assault together.

The suppressed information regarding Eleby, Jacobs, and Porter would have further called into question the investigation and, indeed, the prosecutors. *Kyles*, 514 U.S. at 445. The jury may have lost confidence in the prosecutors upon learning that they stood by while a detective manipulated and intimidated a fourteen-year-old runaway, or accepted evidence that had been gathered from someone who was high on drugs. The same jury would have harbored concerns about the investigation as a whole upon learning that it had been built on statements derived from such techniques.

iii. As to Thomas, the prosecution withheld evidence contradicting his trial testimony that he had told his aunt about seeing a group attack in the alley. Pet. App. 23a. Thomas's aunt was the only person who could corroborate or contradict his account of his actions that day because, unlike the other purported eyewitnesses, Thomas did not claim to have witnessed the assault with anyone else. As investigators knew, however, his aunt did not recall such a conversation. A1010.

Between his grand jury appearances and trial testimony, Thomas had changed both what he purportedly saw and where he purportedly saw it. See p. 13, *supra*. "A jury would reasonably have been troubled by the adjustments" in Thomas's testimony. *Kyles*, 514 U.S. at 443. And the jury's verdict indicates that it "disbelieve[d]" Thomas insofar as it convicted someone that he said was not present. Pet. App. 47a. To the extent, then, that his

testimony had any "strengths," *ibid.*, evidence showing that it lacked corroboration would have been useful in fully impeaching his testimony.

C. The Court Should Clarify That Evidence Developed After Trial May Be Considered In Evaluating The Materiality Of Evidence Suppressed Before Trial

When petitioners learned that McMillan had been seen acting suspiciously in the alley as part of discovery in their post-conviction proceeding, McMillan was already serving a life sentence for a disturbingly similar murder committed in 1992 just three blocks from the garage where Mrs. Fuller was killed. Like Mrs. Fuller, McMillan's 1992 victim was "dragged * * * through" an alley. Like Mrs. Fuller, McMillan's 1992 victim was found naked from the waist down with her sweater "pushed up." Gov't C.A. Br. 53. And, like Mrs. Fuller, McMillan's 1992 victim suffered injuries from an act of sodomy that a medical examiner classified as "unusual" and "rare." A2179-2180. Between Mrs. Fuller's murder in October 1984 and his 1992 murder, McMillan was outside of custody for only about three months.

The materiality of the evidence withheld from petitioners at trial is manifest, but it is further "confirmed by" McMillan's 1992 murder. *Kyles*, 514 U.S. at 448. The government has conceded that the Court can consider McMillan's 1992 murder to the extent it shows how petitioners' original trial would have unfolded. See Br. in Opp. 19. In that regard, the 1992 murder reveals three evidentiary theories petitioners would have developed in their original trial. First, because McMillan committed the 1992 assault alone, and inflicted greater injuries on that victim than had been inflicted on Mrs. Fuller, Pet. App. 112a n.14, petitioners would have developed evidence that McMillan was capable of inflicting the injuries on Mrs. Fuller by

himself. Second, petitioners would have developed evidence of McMillan's propensity to sodomy and sexual violence, as expert testimony confirms that someone who commits such an act is likely to do so more than once. Pet. App. 19a. And, third, petitioners would have developed further evidence that McMillan did not commit crimes with large groups.

The Court should go further, however, and consider the similarities between McMillan's 1992 murder and the crime of which petitioners are convicted in evaluating the materiality of the evidence placing him at the crime scene. The reality is that the evidentiary record for a *Brady* claim is made years after the fact. Events that occur after trial already shape that record: physical evidence can be misplaced or devolve; or a witness may move or his memory fade. These events benefit the party that does not bear the burden of proof, which here is the government. See, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991).

The government derived an advantage in petitioners' trial by suppressing the McMillan evidence. It should not benefit again in petitioners' post-trial proceedings by being shielded from the full evidence that would be available to a jury considering petitioners' guilt today. Such an outcome is inconsistent with the materiality standard's "overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. Nor can reviewing courts satisfy that "overwhelming concern" if they turn a blind eye to probative evidence that speaks to the fundamental justice of the defendant's conviction. Here, the power of that evidence is stark, as McMillan's chillingly similar 1992 murder is the best possible evidence that petitioners' convictions are unjust.

* * * * *

With or without consideration of McMillan's 1992 murder, the cumulative power and breadth of the suppressed evidence is remarkable. That evidence begins with the statements placing McMillan, a violent felon convicted of similar crimes, at the crime scene and acting suspiciously. It continues with statements from witnesses at the crime scene at the estimated time of death that directly suggest that Mrs. Fuller was killed by one or two people, which, of course, is precisely what a reasonable juror would infer based on the suppressed evidence regarding McMillan.

To rebut the persuasiveness of this evidence, the government can call only on the strained and contradictory testimony of purported eyewitnesses. That testimony would have been undermined by the preceding suppressed evidence, as well as evidence further impeaching the prosecution's witnesses and its investigation itself. Even without the suppressed evidence, the jury in petitioners' case struggled to reach a verdict. With it, there is far more than a mere "reasonable probability" that the jury would have had reasonable doubt and therefore would have voted to acquit. *Smith*, 132 S. Ct. at 630.

CONCLUSION

The judgment of the District of Columbia Court of Appeals should be reversed.

Respectfully submitted.

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